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MARY A. MURPHY, dba ALEX PICKERING TRANSFER COMPANY, and PICKERING TRANSFER COMPANY, INC., a Utah corporation v. PUBLIC SERVICE COMMISSION OF UTAH, REDMAN VAN & STORAGE COMPANY, BARTON TRUCK LINE, INC., UINTAH FREIGHTWAYS, MAGNA-GARFIELD TRUCK LINE, PALMER BROTHERS, INC., RIO GRANDE MOTOR WAY, INC., MILNE TRUCK LINES, INC., ASHWORTH TRANSFER, INC., BILLS MOVING, INC., A-ONE MOVING AND DELIVERY, LEWIS BROS. STAGE LINES and

UTAH PACKAGE EXPRESS, INC. : Brief of Appellant

Utah Supreme Court

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William S. Richards, Irene Warr, Keith E. Sohm; Attorney for Defendants.

IN THE SUPREME COURT OF THE STATE OF UTAH

MARY A. MURPHY, dba ALEX PICKERING TRANSFER COMPANY, and PICKERING TRANSFER COMPANY, INC., a Utah corporation,

Plaintiffs,

vs. Case No. 13926

PUBLIC SERVICE COMMISSION OF UTAH, REDMAN VAN & STORAGE COMPANY, BARTON TRUCK LINE, INC., UINTAH FREIGHTWAYS, MAGNA-GARFIELD TRUCK LINE, PALMER BROTHERS, INC., RIO GRANDE MOTOR WAY, INC., MILNE TRUCK LINES, INC., ASHWORTH TRANSFER, INC., BILLS MOVING, INC., A-ONE MOVING AND DELIVERY, LEWIS BROS. STAGE LINES and UTAH PACKAGE EXPRESS, INC.,

Defendants.

BRIEF OF PLAINTIFFS

Original Action in This Court to Review
Order of the Public Service Commission of Utah

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Defendants.

BRIEF OF PLAINTIFFS

NATURE OF CASE

This is an original action brought in this Court pursuant to §54-7-16, U.C.A. 1953, to review an order of defendant Public Service Commission of Utah (*"Commission"*) which denied plaintiffs' application to transfer a motor carrier contract permit and certificate of convenience and necessity.

DISPOSITION BELOW

The Commission's Order of October 30, 1974, (Commission Case No. 6750) denied plaintiffs' Application to transfer Contract Carrier Permit No. 130 and Certificate of Convenience and Necessity No. 684 sub 1 from plaintiff Murphy to her wholly owned corporation, plaintiff Pickering (R. 54-7).

RELIEF SOUGHT

Plaintiffs pray that the Commission's Order of October 30, 1974, be reversed and remanded with direction that the Commission approve plaintiffs' Application for transfer, and that plaintiffs be awarded their costs from the other defendant carriers.

STATEMENT OF FACTS

Plaintiff Murphy is a 92 year old widow who succeeded, pursuant to the Commission's Order of November 17, 1954, to the common and contract carrier rights of her deceased husband, John M. Murphy, issued May 16, 1936, and she now holds Contract Carrier Permit No. 130, issued by the Commission, authorizing her:

> "To operate as a contract motor carrier of all kinds of personal property, including merchandise, machinery and other property which she has occasion to carry in the course of the conduct of her transportation business within a 50-mile radius of Salt Lake City, excluding pickup and delivery service within the area described in Certificate of Convenience and Necessity No. 684",

and she now holds Certificate of Convenience and Necessity No. 684 sub 1, issued by the Commission, authorizing her:

> "To operate between all points and places in Salt Lake County and all points and places in Davis County south of the junction of U.S. Highways 89 and 91 just north of Farmington, Utah, but excluding from said area that portion of Salt Lake County which is both west of 4800 West and south of 1300 South, but including the town of Kearns, Utah." (R. 57)

In *Murphy v. Public Service Commission*, 30 U.2d 140, 514 P.2d 804 (1972), this Court interpreted the foregoing Contract Carrier Permit to hold it is a general permit "not limited to a particular contract nor to hauling for a particular person." In so holding, this Court vacated the Commission's Order of July 10, 1972, in the Commission's Case No. 1863 (R. 79-84, Special Record), which had held upon complaint filed by all of the carriers who are defendants in this action, that

> (1) the contract carrier authority granted Mrs. Murphy in 1954 was limited to those two shippers, Campbell Soup and Industrial Supply, for whom she had filed contracts in 1954;
>
> (2) that in order to serve additional shippers for whom she filed contracts in March, 1972, she must first comply with §54-6-8, U.C.A. 1953, in the same manner as if she were applying for a new contract carrier permit, by having the Commission determine, after notice and hearing, that the highways over which she would operate are not unduly burdened, that the granting of the application will not unduly interfere with the traveling public and will not be detrimental to the best interests of the public, and that existing transportation facilities do not provide reasonable or adequate service; and
>
> (3) that plaintiffs' failure to provide service for Industrial Supply constituted a forfeiture of right to reinstitute service without showing the service was

necessary or that she was not responsible for failure to give service.

Plaintiff Pickering Transfer Company, Inc. is a Utah corporation, all of whose stock is owned by plaintiff Murphy (R. 2, 76, 161-2, 198). The other named defendants hold authority from defendant Public Service Commission to operate as common motor carriers of property pursuant to certificates of convenience and necessity issued to them, which includes the carriage of property within the area encompassed in plaintiff's common and contract carrier authority, all of whom protested plaintiffs' subject transfer Application.

On February 8, 1973, plaintiffs Murphy and Pickering jointly executed and filed Application (R. 1-4) with the Commission which generally set out that:

(a) Plaintiff Murphy holds the Common Carrier Certificate and Contract Carrier Permit as aforesaid.

(b) Pickering Transfer Company, Inc. is a newly organized Utah corporation, all of whose stock is owned by plaintiff Murphy.

(c) On March 1, 1972, plaintiff Murphy executed a written agreement, a copy of which was attached to the Application (R. 5-10), with Max W. Young, by which it was agreed:

(i) After February 1, 1972, Mr. Young would manage Pickering Transfer Company for his own account;

(ii) Pickering Transfer Company, Inc. would be formed and all of its stock would be issued to plaintiff Murphy;

(iii) Application would be filed with the Commission for approval of transfer of said Certificate and Permit to Pickering Transfer Company, Inc.; and

(iv) Upon such approval, Mr. Young would purchase all of the stock of Pickering Transfer Company, Inc. and certain detailed equipment for $23,400, if the Commission approved the transfer of the Certificate and Permit, or $13,400 if only the Certificate transfer were approved, all on the terms and conditions set out in said agreement.

(d) Plaintiff Murphy is 89 years old and it is necessary and desirable for her to sell her business. Pickering Transfer Company, Inc. is fit, willing and able to render said service and the public interest will not be adversely affected by granting the application for transfer of both the Certificate and Permit.

That same agreement of February 1, 1972, was before the Commission as Exhibit 1 in the prior Case No. 1863 (Ex. 1, Vol. 2, Special Record).

Hearing on the transfer application in Commission Case No. 6750 was held before the Commission on April 6, 1973. At that time the Commission's prior 1972 orders in Case No. 1863 were in effect and on appeal. Defendant carriers appeared and did not protest transfer of the Certificate of Convenience and Necessity, but did protest transfer of the Contract Carrier Permit. The record reflects (R. 159) defendants' counsel said:

"Mr. Richards: We are not challenging the Common Carrier cartage Permit. I am sure that it is active and all of the criteria exist for a valid transfer.

"Miss Warr: My clients have instructed me not to oppose any transfer of Mrs. Murphy's Certificate of

> Convenience and Necessity with respect to cartage service."

Both defense counsel stated their sole interest was as to the extent of Murphy's contract service for Campbell Soup Company since Murphy was not then serving Industrial Supply, so that if Murphy was not then serving Campbell Soup Company, there would be "no contract carrier authority subject to transfer" (R. 159-60). All parties stipulated that the Application to transfer the Contract Carrier Permit would be subject to this Court's determination in Case No. 1863 then on appeal as to the extent of the Contract Carrier Permit itself (R. 158-61).

Both plaintiffs subscribed to the facts stated in the Application, as aforesaid, including the agreement that the Certificate and Permit would be transferred to the corporation, subject to Commission approval. Max W. Young, who joined in the Application, testified to all of the facts contained in the Application, as recited above, without objection or contradiction (R. 161-2). Detailed evidence was admitted as to the transferee corporation's financial condition and the operating equipment it would have (Ex. 1-3, R. 66-7, 197-8), showing a net worth of $23,896 and nine vehicles, and no issue was made by any defendants that such was inadequate. Mr. Young, who would become the transferee corporation's executive officer, testified he was willing to conform to Commission rules and regulations in operating the business, and when asked to tell his experience, defense counsel said:

> "I am not going to challenge Mr. Young's experience in the motor carrier business — he is a very knowledgeable experienced individual in the business, per se" (R. 188-9).

Defendants crossexamined only as to the extent of service to Campbell Soup Company and put on no evidence of their own or contradictory evidence to plaintiffs' case. All parties rested and the Commission took the matter under advisement.

In October, 1973, this Court's decision in *Murphy v. PSCU, supra,* was handed down in the Commission's Case No. 1863. Defendant carriers petitioned the Commission to reopen this case (R. 21-4), and over plaintiffs' objection (R. 27-31), the Commission reopened the case for hearing on July 26, 1974 (R. 52). The Commission took notice of the proceedings in Case No. 1863 (three special volumes in this record), and this Court's decision thereon (R. 214). Defendants proposed to put on testimony that each carrier has made a substantial investment in plant and equipment to serve the territory involved in plaintiffs' contract carrier permit, that each depends upon traffic originating within that territory to support the remaining territory served and that each would be materially and adversely affected if the Permit were transferred. Plaintiffs objected to the admission of additional testimony on the grounds that no showing had been made as to need or basis, such as surprise, fraud, mistake or newly discovery evidence, for taking additional evidence when it was not offered at the first hearing (R. 209, 212-3, 218,222), and objected that such testimony would be immaterial and irrelevant to the issues before the Commission on transfer, and that it was pure incompetent, self-serving speculation that the defendant carriers would be affected by the transfer (R. 219, 222). The Commission was not in position to rule upon plaintiffs' objections and took them under advisement (R. 221) and so, subject to those objections and rulings thereon, the parties stipulated that if each defendant carrier called a witness, the witness would so testify (R. 222). The

Commission took notice of plaintiff Murphy's annual reports and shipper contracts filed with the Commission (R. 88-153, 223) which clearly show an operating, functional business. The parties again rested and the case was again taken under advisement.

On October 30, 1974, the Commission made and entered its Report and Order (R. 54-6) which concluded that before transfer of plaintiff Murphy's Contract Carrier Permit to her wholly owned corporation could be approved, she must first prove that existing transportation facilities do not provide reasonable and adequate service in the same manner as one applying for issuance of a new contract carrier permit under §54-6-8, U.C.A. 1953, and denied the Application for transfer of the Contract Carrier Permit. The Commission made no finding or conclusion that plaintiff Pickering Transfer Company, Inc. was not fit, ready, willing and able to operate either or both the Certificate or Permit, but concluded that it could not be determined if the transferee is ready, willing and able to operate the Certificate exclusive of the Permit, nor could contractual basis be found to determine the value of the Certificate independent of the value of the Permit, and for those sole reasons, denied the Application to transfer the Certificate without prejudice to reapplication to transfer the Certificate alone.

Plaintiffs filed timely Petition for Rehearing (R. 58-60), and upon its denial (R. 64), filed timely Complaint before this Court which issued appropriate writ of review.

ARGUMENT

POINT I. *THE COMMISSION ERRED IN CONCLUDING THAT THERE MUST BE PROOF THAT EXISTING TRANSPORTATION FACILITIES ARE INADEQUATE BEFORE A GENERAL CONTRACT PERMIT MAY BE TRANSFERRED.*

The Commission concluded in its Report and Order (R. 56):

> "Rule No. 3 of the *Motor Carrier Rules and Regulations*, (1937), which rule specifically deals with permits, expressly provides: the person desiring to assume said operating rights shall comply with the provisions of Chapter 65, *Laws of Utah*, 1935, as in filing for a new permit; . . . Additionally, applicants must demonstrate that existing transportation facilities do not provide adequate or reasonable service. Applicants have not met their burden of proof and the transfer of the contract carrier permit . . . should be denied."

This was the critical issue before the Commission, that is, in a contract carrier transfer application, as opposed to an application to issue a new contract carrier permit, must the applicant prove that existing transportation service is inadequate? Clearly, in application for a new permit, there must now be such proof. Chapter 65, *Laws of Utah*, 1935, did not originally so require, but in 1945 the statute was amended to add that requirement. Existing case law [*Collett v. Public Service Comm.*, 116 Ut. 406, 211 P.2d 185 (1949); *Morris v. Public Service Commission*, 7 U.2d 167, 321 P.2d 644 (1958)], makes it clear that in case of application to transfer a common carrier certificate, proof of public convenience and necessity is

not an element of proof, as it is on application for a new certificate, because that issue was decided when the certificate was first issued so that the only important question on transfer is the qualification of the proposed transferee. Is the law any different in applications to transfer contract carrier permits?

Transfer applications are normally routine, since by logic and case law the questions of public need for the carrier service and correlative adequacy of existing service were decided when the certificate of convenience and necessity, in the case of a common carrier, or permit, in the case of a contract carrier, was first issued, leaving at issue on later application to transfer only questions of the transferee's financial ability, equipment, experience, fitness, willingness and ability to serve and the resulting effect on the public if the transfer is approved.

In *Collett v. Public Service Commission, supra,* Gould applied to transfer his certificate to Lang. Existing carriers protested and contended applicants were under the duty to show that public convenience and necessity require the service sought to be rendered by Lang. The Commission determined:

> ". . . This Commission has determined in a prior proceeding that public convenience and necessity require the services which Gould is authorized to perform under said Certificate. Lang proposes simply that he be authorized to enjoy the rights and discharge the obligations and duties of Gould. Lang seeks the right to perform those services which Gould is presently authorized to perform, nothing more. It having been determined by this Commission

that public convenience and necessity require such services, that question is not an issue in this case and need not be again determined. The motor carrier rules and regulations of this Commission now and since June 1, 1937, in force and effect so provide; and the procedure of this Commission in cases such as this has been consistently in accordance therewith."

This Court affirmed saying:

"It would seem reasonable to believe from the following facts that public convenience and necessity does now exist for the continuance of the service contemplated: An increase in carrier service is not contemplated by the application; only a substitution of certificate holders is contemplated; and public convenience and necessity has once been decided as existing, and has been recognized as continuing to exist to the present time by continuous exercise by Gould of his certificate rights, which had not been revoked prior to this hearing. *The only important question under such circumstances is that of the qualification of the prospective new certificate holder to render the necessary public services.* The question as to whether or not the opportunity to hold the newly issued certificate should be offered to existing certificate holders rather than a stranger is more a question of private interests than a question of public interest. *If the Commission were restricted to present certificate holders, it might have a rather serious injurious effect upon the carrier who wishes to abandon his certificate and retire from business. His years spent in working up a good will would net him nothing, as no one would be interested in taking over where he leaves off . . .*"

"The Commission took the view, that the principal question in such a problem as this is that of the financial status, fitness, willingness and ability of the proposed new certificate holder to carry on the business; that so far as the public is concerned, the public convenience and necessity would not be adversely affected by the change in certificate holders. The protestants made no effort to show that conditions had so changed that there was no necessity for Gould to continue in business. They really fear the competition of the Lang Company — that it will adversely affect their business — a matter that did not seem to bother them so long as Gould remained in business. . . ."

. . .

"As to the matter of competition so emphatically emphasized by counsel for the protestants, we should not overlook the fact that in this case we are not dealing with an application, the granting of which, will increase the number of competitors in the field, and thus jeopardize the service to the public. We are dealing with merely a substitution of one carrier for another. . . ."
(Emphasis added)

In *Morris v. Public Service Commission, supra,* Watson applied to the Commission to transfer his certificate to Morris. Without giving notice that cancellation of the certificate would be considered at the hearing, the Commission denied the transfer application and cancelled the certificate. This Court reversed, saying:

"Also the question of public convenience or necessity is not questioned in transfer cases since it is presumed such necessity was determined when the original certificate of convenience and necessity was issued. . . ."

"The purpose in proceedings as the one at bar have been described in the case of *Collett v. Public Service Commission.* There speaking of the cancellation and reissuance of a certificate of convenience and necessity to another party the court said:

> '* * * that the principal question in such a problem as this is that of the financial status, fitness, willingness and ability of the proposed new certificate holder to carry on the business: that so far as the public is concerned, the public convenience and necessity would not be adversely affected by the change in certificate holders.'

"The Commission failed to make a finding as to the fitness of Morris, financially or otherwise, to assume Watson's certificate. There is no reference made to Morris as to his qualifications, his equipment, willingness or the resulting effects to the public if the application were granted. In other words, the Commission has not indicated any reason for denying Morris' application because of Morris' position or shortcomings.

"The Commission's denial of the Morris application was based solely on the conclusion that the Watson certificate should be cancelled — a matter not properly before it.

"The Commission's order are set aside and the case is remanded for action in conformity with this opinion."

Logic compels the same rule be applied for transfer of permits, for the showing that "existing transportation facilities do not provide adequate or reasonable service" required by §54-6-8, U.C.A. 1953 on applications for new

contract carrier permits, was made and found existing when the permit was first issued, and has been recognized as continuing to exist to the present time by plaintiff Murphy's continuous exercise of her contract rights to time of hearing. The transferee corporation proposes only to assume her existing authority, nothing more. There cannot be an increase in carrier service as no change in the scope of authorized service is requested. Therefore, pursuant to the *Collett* case, "the only important question is the qualification of the prospective . . . holder to render the necessary public services."

There is absolutely no case law or logic to support reasoning that on a contract transfer application, applicants must prove a new issue case. The Commission certainly did not require such proof in the 1954 hearing on Case No. 2945 when the Contract Carrier Permit was transferred to Mrs. Murphy from her deceased husband's estate (Special Record R. 97-102), and there is no evidence that the Commission has ever required such proof in the past.

At the first hearing on April 6, 1973, defendant carriers stated the sole issue was whether Mrs. Murphy was transporting as a contract carrier for Campbell Soup Company, arguing that if she was not, then there would be no contract carrier authority available to transfer; nevertheless, all parties stipulated that the Contract Carrier Permit transfer Application was subject to this Court's determination as to the extent of the Permit (R. 159-61). In *Murphy v. Public Service Commission, supra,* this Court held in October, 1973, that the Permit was general so that Mr. Murphy could enter into new contracts without obtaining Commission approval and without proving to the Commission that existing carrier service was inadequate. The necessary result of that decision

was that Mrs. Murphy did have contract carrier authority extant under her Permit, regardless of whether or not she was then serving Campbell Soup Company, including the right to serve General Electric and Certified Warehouse, for whom she filed contracts in April, 1972 (R. 149-52) but which the Commission had ordered her to desist from serving, as well as the right to enter into new contracts. Notwithstanding that decision and defendants' stipulation, accepted by the Commission at the first hearing (R. 159-61), that the transfer Application was subject to that decision, defendants argued at the second hearing that Mrs. Murphy still must prove that existing carrier service is inadequate before the Permit may be transferred. Defendants argued to the Commission:

> "But there again I'm not going to urge the Commission in this proceeding to take the authority that is now held by Mary A. Murphy and cancel that authority or in any way alter or amend it in this proceeding. My whole position is that you cannot transfer it to that corporation or to any other person without the Applicants for transfer first making the showing as required by the statutes and by your own rules."

Defendants' only position is a technical argument that Rule 3 of the Commission's Motor Carrier Rules and Regulations, promulgated June 1, 1937, dealing with transfer of permits, provides "the person desiring to assume said operating rights shall comply with the provisions of Chapter 65, *Laws of Utah*, 1935, as in filing for a new permit", whereas Rule 2, dealing with transfer of certificates of convenience and necessity provide that the applicants "will not be required to prove convenience and necessity".

Chapter 65, *Laws of Utah*, 1935, required applicants for new certificates of convenience and necessity to prove the public convenience and necessity required issuance of the certificate, but no such or similar requirement was then

placed upon applicants for contract carrier permits. It was not until 1945 that Chapter 105, *Laws of Utah*, 1945, added to the existing statute (76-5-21, U.C.A. 1943) that applicants for new contract carrier permits must prove "the existing transportation facilities do not provide adequate or reasonable service."

Thus, Chapter 65, *Laws of Utah*, 1935, provided:

> "Section 6. *Certificate of Convenience and Necessity.*
>
> ". . . The commission, upon the filing of an application for such certificate, shall fix a time and place for hearing thereon, . . . *If the commission finds from the evidence that the public convenience and necessity require the proposed service* or any part thereof it may issue the certificate as prayed for, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the right granted by such certificate such terms and conditions as in its judgment the public convenience and necessity may require, otherwise such certificate shall be denied. Before granting a certificate to a common motor carrier, the commission shall take into consideration the financial ability of the applicant to properly perform the service sought under the certificate and also the character of the highway over which said common motor carrier proposes to operate and the effect thereon, and upon the traveling public using the same, and also the existing transportation facilities in the territory proposed to be served. If the commission finds that the applicant is financially unable to properly perform the service sought under the certificate, or that the highway over which he proposes to operate is already sufficiently burdened with traffic, or that the granting of the certificate applied for will be detrimental to the best interests of the people of the state of Utah, the commission shall not grant such certificate."
> (Emphasis added)

* * *

"Section 9. *Contract Carrier Permit.*

"The commission upon the filing of an application for a contract motor carrier's permit by any other person than those referred to above in this section (meaning prior contract carriers) shall fix a time and place for hearing thereon and shall give the same notice as provided in section 6 hereof . . . . If, from all the testimony offered at said hearing, the commission shall determine that the highways over which the applicant desires to operate are not unduly burdened; that the granting of the application will not unduly interfere with the traveling public; and that the granting of the application will not be detrimental to the best interests of the people of the state of Utah and/or to the localities to be served, the commission shall grant such permit . . ." (parentheses ours)

Section 9 of the *Laws of 1935,* as quoted, became Section 76-5-21, U.C.A. 1943. Chapter 105, *Laws of Utah,* 1945, provided:

"Section 3. Section Amended.

Section 76-5-21 Utah Code Annotated 1943 is amended to read:

"76-5-21. Contract Carrier—Intrastate Commerce—Permit.

* * *

"The commission upon the filing of an application for a contract motor carrier's permit shall fix a time and place for hearing thereon and may give the same

> notice as provided in section 76-5-18 hereof. *If,* from all the testimony offered at said hearing, *the commission shall determine that* the highways over which the applicant desires to operate are not unduly burdened; that the granting of the application will not unduly interfere with the traveling public; and that the granting of the application will not be detrimental to the best interests of the people of the state of Utah and/or to the localities to be served, and *if the existing transportation facilities do not provide adequate or reasonable service, the commission shall grant such permit."*(emphasis added)

The law has not since been amended. Section 54-6-8, U.C.A. 1953, is as last quoted. The history of amendments to the Utah Motor Vehicle Act is traced in *Rowley v. Public Service Commission,* 112 Utah 116, 185 P.2d 514 (1947).

The Commission erred in concluding that the 1945 amendment was incorporated into Commission Rule No. 3. Rule No. 3 refers only to Chapter 65, *Laws of Utah,* 1935, and not to subsequent amendments thereto. The same rules of construction and interpretation govern the construction and interpretation of administrative rules as apply to statutes; *M. Kraus & Bros. v. U.S.,* 327 U.S. 614, 90 L.Ed. 894, 66 S.Ct. 705; 2 Am. Jur.2d, Administrative Law, §307, p. 135 *City of Seattle v. Green,* 51 Wash.2d 871, 322 P.2d 842, 844 (1958) holds:

> "The general rule is that when a statute is adopted by specific descriptive reference, the adoption takes the statute as it exists at that time, without subsequent amendments, but when the language of the adopting act evidence legislative intent to include subsequent amendments, courts will give effect to that intent."

See also *Polson Logging Co. v U.S.*, 160 F.2d 712 (C.A. 9th, 1947). *State v. Dobson*, 169 Ore. 546, 130 P.2d 939 (1942), cited the rule saying:

> "This is for the reason that the adopting statute 'means the law as existing at the time of the adoption, and does not adopt any subsequent addition thereto or modification thereto'. Endlich, Interpretation of Statutes, p. 115, §85, p. 312 §233."

Thus, Commission Rule 3, promulgated in 1937 as to the Laws of 1935, did not adopt the 1945 statutory amendment.

> " . . . Even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing it was intended as a substitute for the first act, it will operate as a repeal of that act." *Dist. of Columbia v. Hutton*, 143 U.S. 18, 27, 12 S.Ct. 369, 372, 36 L.Ed. 60.

Here, the 1945 amendment covered the whole subject of new contract carrier applications and embraced the new requirement of showing inadequacy of existing service, repealing Commission Rule 3 to the extent the latter might be construed to require showing of inadequacy of existing contract carrier service on transfer applications.

In *Rowley v. Public Service Commission, supra*, this Court approved this quotation from Sutherland on Statutory Construction, §241, p. 320:

> "In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit the intention is to be collected from the context, from the

> occasion and necessity of the law; from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion."

Kesler & Sons Contruction Co. v. Utah State Division of Health, 30 U.2d 90, 513 P.2d 1017 (1973) held:

> "We think the point where the court should refuse enforcement of such an administrative regulation is in accord with the usually applied rule of review and control of administrative actions: Where it so clearly transgresses beyond any reasonable justification in relation to its purpose that it should be deemed capricious and arbitrary."

Reason and logic compel application of the *Collett* case, *supra*, to this case. There simply is no reason why applicants for transfer of permits should be required to prove inadequacy of existing service when applicants for transfer of certificates are not so required. Here is Mrs. Murphy, an aged widow, who desires to sell her contract carrier permit. Now that she wishes to retire from business, she and her husband having spent years in working up good will, is she to net nothing, which would be the result, if she now has to prove that existing carrier service is inadequate. As noted in *Cantlay & Tanzola v. Public Service Commission*, 120 Utah 217, 233 P.2d 344 (1951), quoted on page 26 hereof, if existing services are adequate, it is because plaintiff has been providing a portion of the trucking service. It is obviously to the public interest, or perhaps more accurately, to her contractees' interests, that her contract carrier service be continued by a qualified transferee. Likewise, it is obvious that defendant carriers' protests arise only out of fear of continued competition; indeed, that was the thrust of the only evidence that defendant carriers offered, albeit immaterial and incompetent speculation. Defendants' counsel said (R. 210):

> "Mr. Richards: . . . the evidence that I would contemplate offering would be to put on the witnesses . . . who will show the substantial adverse effect that the transfer of this naked contract carrier permit would have upon their existing operations."

As in *Peterson v. Public Service Commission*, 1 U.2d 324, 266 P.2d 497 (1954):

> "Under §54-6-4, U.C.A. 1953, vesting in the Commission power to regulate motor carriers, we do not find any authority either directly, or reasonably incident thereto, by which the Commission could arbitrarily refuse to approve a tariff, and, thus nullify the rights a carrier possesses under a Certificate of Convenience and Necessity."

Thus, the Commission erred as a matter of law when it concluded that plaintiffs "must demonstrate that existing transportation facilities do not provide adequate or reasonable service." The Commission should have concluded that such proof is not required. Since the Commission denied the transfer application upon the erroneous conclusion that plaintiffs were required and failed to so prove, the Order should be reversed.

POINT II. *THE COMMISSION ERRED IN FINDING THERE WAS NO CONTRACT BETWEEN PLAINTIFFS.*

The Commission erred in Finding No. 2 that "per se there is no contract between Murphy and the Corporation" (R. 55). The contract between Murphy and Young, dated March 1, 1972, was admitted in evidence as Exhibit 4 (R. 68-73). By that contract, the parties promised that the plaintiff transferee corporation would be formed with all stock to be issued to Mrs. Murphy (¶7), that application would be filed with the

Commission to transfer the contract carrier permit and common carrier certificate to the corporation then to be formed (¶8), and that Mrs. Murphy would fully cooperate in the prosecution of the application (¶9). The corporation could not join the agreement because it was not then formed, but thereafter the corporation was formed (R. 76). The Application herein, paragraph 5, recites the same contract and its terms as aforesaid, and the corporation executed the Application, thereby ratifying and confirming the contract attached to the Application (R. 4). The Commission should have found that Murphy and the corporation contracted that her carrier certificate and permit would be transferred to the corporation, subject to approval of the Commission.

Even if there were any deficiency in respect to the agreement between the transferor and the transferee, it would not make any difference to the granting of the Application, since the corporate transferee joined in the Application, and the Commission in its Conclusions did not conclude any such deficiency had any effect on the denial of the Application for transfer.

POINT III. *THE COMMISSION ERRED IN FAILING TO MAKE FINDINGS OF UNCONTROVERTED FACTS AS TO THE TRANSFEREE'S QUALIFICATIONS AND IN FAILING TO CONCLUDE THAT THE TRANSFEREE WAS QUALIFIED.*

The Commission erred in Finding No. 3 in reciting that applicants' evidence consisted only of the Application (R. 1-4), financial statements (R. 66-8), equipment list (R. 66A) and the agreement (R. 68-73). Mr. Young testified, without contradiction (R. 160-2):

(a) Murphy is an 89 year old widow and it is necessary and desirable for her to arrange sale and transfer of the permit.

(b) Young is experienced in the motor carrier business and will be active in the day-to-day operations of the corporation's business as its principal shareholder and president if the Application is approved. He is financially able to capitalize the corporation so that it will be in sound operating condition to render the service involved in the Certificate and Permit.

(c) The plaintiff corporation is financially able to render the service authorized by the Certificate and Permit, is fit, willing and able to do so, and that public convenience and necessity will not be adversely affected by change in the Permit holder.

Defendants admitted (R. 188) Mr. Young is a very knowledgeable, experienced individual in the motor carrier business. Young testified (R. 189) he is willing to conform to the rules, regulations and orders of the Commission (Tr. 35). The Commission took administrative notice of Pickering's annual reports, schedule of rates and charges, and contracts with various shippers that have been filed with the Commission and should have made findings with respect thereto. All of this evidence clearly proved that plaintiff Pickering is qualified to assume the extant operating authority.

There is no contradictory evidence. Indeed, the defendant carriers did not contest Pickering's fitness, nor any of the other elements of the transfer application, as to Mrs. Murphy's Certificate of Convenience and Necessity. The Commission's Order denied the Certificate Application without prejudice on the sole grounds that it could not determine if the transferee was ready, willing and able to

operate the certificate without the permit, and that there was no agreement by which the value of the Permit and Certificate could be determined separately (even though the Agreement (Ex. 1) expressly contemplates a price of $23,400 if both authorities are transferred, or $13,400 is only the Certificate transfer be approved). Thus, by necessary implication, the Commission had to conclude that the transferee was qualified and fit.

As stated in the *Collett* and *Morris* cases, *supra*, the elements of proof in the case of transfer of a certificate of convenience and necessity are:

> "The financial status, fitness, willingness and ability of the proposed new certificate holder; that so far as the public is concerned, the public convenience and necessity will not be adversely affected by change in certificate holders."

Further:

> "The only important question under such circumstances is that of the qualification of the prospective certificate holder to render the necessary public services."

In *Salt Lake Transfer Co. v. Public Service Commission*, 11 U.2d 121, 355 P.2d 706 (1960), this Court said:

> "Realizing the limits of this court to review the orders of the Commission, nevertheless, if in relation to the facts before it, the Commission acts in an arbitrary and capricious manner, the order is without authority and must be set aside. Whatever the minimum quantity and quality of evidence necessary to justify administrative action, orders issued in the complete absence of factual support are clearly arbitrary, capricious and void."

"The Commission cannot refuse to believe competent, credible and uncontradicted evidence;" *Lake Shore Motor Coach Lines, Inc. v. Welling*, 9 U.2d 114, 339 P.2d 1011 (1959). Plaintiffs have clearly shown that the proposed corporate transferee is qualified to conduct the contract carrier authority without contradiction in the evidence and even without issue being made thereto by defendants or the Commission. Indeed, the transferee's qualification to operate the common carrier authority was conceded by defendants. Here the Commission made no finding that the transferee corporation was not, and should have found that it was, financially able, fit, willing and able to operate both the certificate and permit authority. The only testimony was that granting of the application would not be detrimental to the best interests of the public and to the localities to be served, and the Commission should have so found. Failure to so find and conclude as to those undisputed, uncontradicted facts was arbitrary and capricious on the Commission's part because had the Commission found or concluded to the contrary, such would have been arbitrary and capricious, given the utter absence of some competent evidence to find the transferee was not so qualified or that the transfer would be detrimental to the best interests of the public and the localities to be served.

In *Williams v. Public Service Commission*, 29 U.2d 9, 504 P.2d 34 (1972), this Court reversed the Commission's order denying application for convenience and necessity, saying:

> "If the only reasonable conclusion to be deduced from the findings would be to grant the application, then the refusal was arbitrary and capricious and should be reversed. . . . By analogy, the standard rule of review is applicable here: that the judgment or order must find support in the findings and conversely,

unless the findings support the judgment or order, it cannot stand."

In *Cantlay & Tanzola v. Public Service Commission*, 120 Utah 217, 233 P.2d 344 (1951), the Commission granted a contract motor carrier permit to Sanders to haul bulk petroleum products for Standard Oil from Salt Lake to Vernal, Sanders having conducted such haul for 20 prior years under slightly different arrangements authorized by a different contract carrier permit. The Commission found specifically that the highways over which Sanders proposed to operate were not unduly burdened, and that granting the application would not unduly interfere with the traveling public and would not be detrimental to the best interests of the public, as required by statute, but did not make a finding that existing transportation facilities were inadequate. Existing carriers appealed on the basis that the statute required the Commission to make a finding of inadequacy of existing service before the application could be granted. This Court noted: "The record is plain that the existing transportation facilities are adequate and reasonable for hauling bulk petroleum from Salt Lake to Vernal", but affirmed saying:

> "What protestants have overlooked is the fact that the applicant's service in transporting to Roosevelt and distributing from there to Vernal has been and currently is part of the existing transportation facilities to Vernal. By its combined procedure of operations applicant has served this shipper for several years. *The existing facilities are adequate because I. Sander Inc. has been furnishing a portion of such trucking service.*
>
> "The fourth provision (of the statute) states affirmatively that the Commission shall grant a

> permit when the existing facilities are not adequate. It does not, however, mandatorily require the Commission to deny a permit in every instance unless the four provisions are found in favor of the applicant." (Emphasis and brackets added)

That is much the same case as here. Plaintiffs have shown without contradiction that the proposed transferee is qualified to conduct the contract carrier authority. If an element of a contract carrier permit transfer case is really introduction of evidence that granting of the application will not be detrimental to the best interests of the public, then upon uncontradicted showing that (1) the authority holder has in fact been operating the authority, (2) that the transferee is qualified to operate it, and (3) that because of the authority holder's age it is desirable that the authority be transferred so that she may retire, that ought to suffice as basis for the Commission to conclude that granting of the application will not be detrimental to the best interests of the public, and any contrary conclusion would be, and is here, arbitrary and capricious, and should be reversed.

Defendants argued to the Commission that no shipper witnesses supported the application. There is no such requirement for transfer applications. Moreover, *Lake Shore Motor Lines v. Welling, supra,* specifically affirmed grant of a common carrier certificate over protestants' objection that no shipper witnesses were required. Here, defendants made no such contention as to plaintiffs' common carrier authority. Consider plaintiff's particular contract carrier authority, being general and unlimited as to any particular shipper. Suppose plaintiff Murphy the day before hearing, had fulfilled all existing contracts, so that on the day of the transfer hearing, she in fact had no outstanding contracts; though she has a right to enter into contracts in the future without

Commission approval (*Murphy v. Public Service Commission, supra,*) would the fact that no shipper could that day support her transfer application mean she could not obtain Commission approval for transfer of her permit? Clearly not. That was then almost plaintiff's predicament as to her contract permit, for on hearing day on April 6, 1973, she was then subject to Commission order not to render contract service to her 1972 customers and permitting her only to serve two accounts whom she served in 1954, one of whom she then no longer served and the other she served only occasionally. Thus, this argument had no merit and the Commission did not make any finding or conclusion with respect to it.

The Commission's "Findings of Fact" (R. 54-7) contain no real findings. Paragraph 1 recites only Mrs. Murphy's authority; paragraph 2 recites the scope of the application and, as shown, erroneously concludes there was no contract per se between plaintiffs; paragraph 3 recites admission of financial statements and equipment lists without making findings as to what they contained, and a recital of speculative, irrelevant testimony as to the effect of granting the application to protestants, without stating plaintiff's objection thereto or the Commission's ruling thereon; paragraphs 4 and 5 merely state the parties' contentions and arguments. Thus, the Commission failed to make any appropriate Findings. The Commission's Conclusions do not relate to the Findings, but instead refer to the erroneous statement of law that applicants must prove that existing transportation facilities are inadequate, as well as prove the grant of application will not be detrimental to the best interests of the public. The Commission found no facts nor was there any evidence in the record, upon which to base the latter conclusion, and it is apparent that the latter conclusion and the Commission's ultimate order was based solely upon the erroneous former conclusion.

POINT IV. *THIS COURT SHOULD DIRECT THE COMMISSION TO GRANT PLAINTIFFS' APPLICATION AND SHOULD AWARD PLAINTIFF COSTS FROM DEFENDANT CARRIERS.*

Based upon the foregoing points, the Commission's Order of October 30, 1974, should be reversed. Because the uncontested, uncontradicted evidence shows plaintiffs' Application should have been granted, the Commission should be specifically directed to grant the Application, particularly considering the litigation that has thus far ensued.

Thus, in 1972, in *Williams v. Public Service Commission, supra,* this Court reversed the Commission's Order denying plaintiffs' Application for Certificate of Convenience and Necessity, saying:

> ". . . we fail to see any basis in reason for the order denying plaintiff's application. Accordingly, it is reversed. Costs awarded to plaintiff as against protestant."

Likewise, considering the litigation that has occurred and upon authority of the *Williams* case, plaintiffs should be awarded their costs from defendant carriers.

CONCLUSION

The only uncontradicted, uncontested evidence in the record was that Pickering Transfer Company, Inc., a wholly owned corporation of plaintiff Murphy, was fully qualified to assume the aged plaintiff Murphy's operating authority. The

Commission denied the transfer application upon the erroneous conclusion of law that applicants for transfer of an existing contract carrier permit must prove that existing transportation facilities are inadequate. The Commission's order should be reversed, with direction to the Commission to grant plaintiffs' Application, and plaintiffs should be awarded their costs from defendant carriers.

Respectfully submitted,

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